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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

UNITED PAPERWORKERS INTERNATIONAL UNION, AFL-CIO and LOCAL 7232 UNITED PAPERWORKERS INTERNATIONAL UNION,
Petitioners,

v.

BRIGGS & STRATTON CORPORATION,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Where a labor contract provides that ". . . all grievances between the two parties shall be deemed arbitrable . . ." and the employer initiates an action against the Union pursuant to § 301 LMRA alleging a breach of the no strike clause and the union denies the allegations and requests the district court to stay the employer's claim for damages pending the arbitration of such claim by the employer in accordance with *Drake Bakeries v. Bakery Workers Local 50*, 370 U.S. 250 (1962) and the district court denies the request for a stay of the employer's damage claim:

I. Did the Court of Appeals have jurisdiction to review the district court's order denying a stay pending arbitration?

A. Does such appellate jurisdiction exist in cases arising under § 301 pursuant to § 1292(a)(1) or has such appellate jurisdiction under § 1292(a)(1) been precluded by *Gulfstream Aerospace Corp. v. Mayocoma Corp.*, 485 U.S. 271 (1988)?

B. Does such appellate jurisdiction exist in cases arising under § 301 pursuant to 9 U.S.C. § 16(a)(1) Federal Arbitration Act (FAA) or do labor contracts fall within the exclusion of 9 U.S.C. § 1 FAA and therefore fall outside of the coverage of § 16(a)(1) FAA?

II. Was the standard applied by the court of appeals for determining whether or not the union was entitled to a stay of the employer's damage claims under § 301 inconsistent with and in disregard of the standards as established in the companion decisions in *Atkinson v. Sinclair Refining Company*, 370 U.S. 238 (1962)/*Drake Bakeries Inc. v. Bakery Workers Local 50*, 370 U.S. 254 (1962)?

PARTIES TO THE PROCEEDINGS

All of the parties to the proceedings below are listed in the caption.

A. Since the proceedings were initiated in the district court back in 1993, the defendant labor organizations are the same, but the names are now the United Paperworkers International Union, AFL-CIO and Local 7232 United Paperworkers International Union.

B. Briggs & Stratton Corporation is the employer.

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UNITED PAPERWORKERS INTERNATIONAL UNION, AFL-CIO and LOCAL 7232 UNITED PAPERWORKERS INTERNATIONAL UNION,

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PETITION FOR A WRIT OF CERTIORARI

Petitioners United Paperworkers International Union, AFL-CIO and Local 7232 United Paperworkers International Union (hereinafter "Union"), the defendants in the district court and appellants in the court of appeals, petition this Court to issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review the judgment in *Briggs & Stratton Corporation v. Local 232, International Union, Allied Industrial Workers of America (AFL-CIO), et al.*, 36 F.3d 712 (7th Cir. No. 94-1484; October 3, 1994). An order denying rehearing and suggestion for rehearing en banc, was entered December 28, 1994.

OPINIONS BELOW

The decision of the three member panel of the Court of Appeals with Judge Cummings dissenting, is reported at 36 F.3d 712, and is reproduced at appendix *infra* (App. A, pp. 1a-24a). The Court of Appeals' order dated December 28, 1994, denying the petition for rehearing and suggestion of rehearing en banc and Circuit Judge Ripple's dissent from the denial of rehearing en banc is reproduced at appendix *infra* (App. E, pp. 40a-41a).

The order of the United States District Court for the Eastern District of Wisconsin dated February 15, 1994, and that contains the denial of the stay is reproduced at appendix *infra* (App. C, pp. 36a-37a). The earlier order of the United States District Court dated November 2, 1993 and the oral opinion issued on October 29, 1993 is reproduced at appendix *infra* (App. D, pp. 38a-39a and App. B, pp. 25a-35a respectively).

JURISDICTION

The Court of Appeals' opinion and judgment issued October 3, 1994 and the Court of Appeals' order denying the Unions' Petition for Rehearing and Suggestion of Rehearing En Banc isued December 28, 1994. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) and in accordance with Rule 13.4 Rules of the Supreme Court of the United States.

STATUTORY PROVISIONS INVOLVED

The relevant portions of § 203(d), 29 U.S.C. § 173(d) and § 301(a), 29 U.S.C. § 185(a) of the Labor-Management Relations Act and 9 U.S.C. § 1-16, of the Federal Arbitration Act are set forth at appendix *infra* (App. F, pp. 42a-44a).

STATEMENT OF THE CASE

A. The Facts.

The Union and Briggs & Stratton Corporation ("Briggs" or "Employer") were at all times material parties to a collective bargaining agreement ("CBA").

The CBA contained the terms and conditions of employment and a no-strike clause and grievance/arbitration procedures that had been agreed to and had provided: ". . . Complaints or grievances which may arise between the Company and the Union . . . shall be handled in the following manner . . . Step 3 . . . general policy grievances by the Company or the Union shall be taken up commencing at this step of the grievance procedure . . . Section 2. Should there be no settlement of a grievance or grievances between the Union and the Company after the outlined steps of the Contract grievance procedure have been exhausted, either party may submit such grievance . . . to arbitration within sixty (60) days after the grievance has first been discussed in the third stage of the grievance procedure . . . With the exception of grievances concerning the incentive system outlined in this Contract, all grievances between the two parties shall be deemed arbitrable . . ."

In August 1993 Briggs had announced that it was going to reorganize its Large Engine Division (LED). The changes to be implemented would take what had been one large department and make it into a number of smaller departments. This change would modify the manner in which the employees would thereafter be able to exercise their seniority rights in order to avoid being laid off as well as in the filling of job openings. The change would most seriously impact on those employees with the greatest amount of seniority in that they would be more limited in the exercise of such seniority to a smaller department.

The employees in LED voiced objections to Briggs announced changes. In response to these objections the Union's leadership beginning on August 30, 1993 supported a "work to rule" campaign [1]. The Union's leader-

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[1] "The work to rule campaign encouraged members of the Union to enforce every aspect of the collective bargaining agreement and the plant's operating procedures . . ." (*see* App. A, p. 10a n.1, Cum-

ship also encouraged members to reject working such overtime that under the CBA had been agreed was voluntary.

On September 13, 1993 the Union initiated a policy grievance claiming that Briggs' announced organizational changes in LED, if implemented, would violate the seniority provisions as provided for in the CBA. The Union requested that such policy grievance be submitted to arbitration in an expedited manner. On September 15 Briggs agreed to proceed directly to arbitration relative to the Union's policy grievance.

The work to rule campaign was ended on September 23, 1993 and beginning November 1 and through March the CBA had provided that Briggs had the right to schedule certain weekend overtime on a mandatory basis; from April to November weekend overtime under the CBA was voluntary.

On October 7, 1993, Briggs, without prior utilization of the grievance procedures, commenced a § 301 action in the district court and it sought (a) a preliminary injunction [2], (b) damages in excess of three million dollars for itself, and (c) damages for unnamed employee/members it claimed had been damaged by the Union's alleged breach of the no strike provision in the CBA.[3]

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mings J. dissenting opinion n.1). Refusal to work overtime that is voluntary is a protected activity. *Dow Chemical Co.*, 152 NLRB 1150 (1965); *Jasta Mfg. Co.*, 246 NLRB 48 (1979), *enfcd.*, 634 F.2d 623 (4th Cir. 1980).

[2] The object of the preliminary injunction was the work to rule campaign that had ended on September 23 and the Union's encouragement of employees not to volunteer for overtime which under the terms of the CBA was voluntary except for the period beginning in November and through March where it was agreed could be mandatory.

[3] Briggs' § 301 complaint was in substance modeled after the employer's three count complaint in *Sinclair Refining Co. v. Atkinson*, 290 F.2d 312 (7th Cir. 1961), affirmed in part and reversed

On the same day that Briggs filed its § 301 action it also sent out a written notice to all of its employees informing them that "We will pursue a damage action seeking to recover the lost wages, hours and incentives for all employees who have been damaged by the illegal work slow down".

At no time prior to the filing of its § 301 suit had Briggs or had any employee ever initiated any grievance or made any demand under the CBA that the Union submit to arbitration Briggs' claim that the Union had engaged in a breach of the no strike provisions as was contained in the CBA.

B. The Proceedings Below.

1. *The District Court Proceedings.*

The Union, upon being served with the summons and complaint and the district court's order scheduling a hearing for October 27, 1993, pursuant to Briggs' application for a preliminary injunction, filed its answer on October 21, 1993. The Union's answer (1) denied that it had breached the no strike clause, and (b) raised as an affirmative defense Briggs' failure to exhaust the remedies as provided for in the CBA's grievance/arbitration provisions.[4] The Union also filed a Rule 12(b)(6) motion seeking to dismiss Briggs' action including its request for a preliminary injunction and its claim for damages for itself and for employees or alternatively for a stay of Briggs' claim that the Union had breached the no strike

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in part, *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195 (1962) and *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238 (1962). Briggs, however, instead of suing individual employees to recover damages as was the case in *Atkinson* instead sued to recover damages for individual employees.

[4] The Union followed the procedures that the Seventh Circuit had established for cases involving *Drake Bakeries* stays, *see Mautz & Oren v. Teamsters Local No. 279*, 882 F.2d 117, 1126 (7th Cir. 1989). (*See* App. A, p. 13a)

clause pending the arbitration of such claim as was provided for in the CBA.

The district court proceeded with the hearings on Briggs' application for a preliminary injunction. At such hearings the Union informed the district court that it would arbitrate Briggs' claim as to whether or not the Union had violated the no strike clause if Briggs requested it to do so (App. A, p. 21a n.5)

At the conclusion of the hearings on Briggs application for a preliminary injunction on October 29 the district court granted Briggs a preliminary injunction. (App. B, p. 33a) The district court did not at that time rule on the Union's request for a stay.[5] On February 15, 1994 the district court issued an order denying the Union's Rule 12(b)(6) motion to dismiss for Briggs' failure to have exhausted the grievance/arbitration procedures because ". . . preliminary injunctive relief has already been granted" (App. C, p. 36a).[6] The district court also denied the Union's request to stay Briggs' damage claim pending the arbitration of such claim because, "The contract involved here is not susceptible to a construction that the company is bound to arbitrate its claim for damages against the union for breach of the no-strike clause. *See generally Atkinson v. Sinclair Refining Company*, 370 U.S. 238 (1962) . . ." (*See* App. C, p. 37a)[7]

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[5] The Union took a timely appeal pursuant to 28 U.S.C. § 1292(a)(1) from the district court's order granting Briggs the preliminary injunction. This appeal was docketed by the Seventh Circuit Court of Appeals as Seventh Circuit Dkt. No. 93-3868.

[6] The findings of fact and conclusions of law made by a court granting a preliminary injunction, however, are not necessarily binding as to the ultimate merits of the underlying claim. *See University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). The district court's order made no mention of Briggs' right to pursue damages on behalf of employees although the Union had sought to have that claim dismissed.

[7] The district court also sua sponte ordered that Briggs' claim that the Union breached the no strike clause be stayed until the

The Union timely appealed from that portion of the district court's February 15, 1994 order that denied the stay of Briggs' damage action pending the arbitration of that claim. The Union invoked appellate jurisdiction to review the district court's order denying the stay pending arbitration under 28 U.S.C. § 1292(a)(1) and 9 U.S.C. § 16(a)(1) of the Federal Arbitration Act (FAA).

2. *The Proceedings Before The Court Of Appeals.*

The Court of Appeals consolidated the appeal, with the earlier appeal taken from the preliminary injunction and which was still then pending before it. Prior to the decision by the Court of Appeals, the arbitrator had issued his decision relative to the Union's policy grievance. The preliminary injunction by its terms was to lapse on the date the arbitration decision issued and the Court of Appeals being so notified dismissed the Union's appeal taken from the preliminary injunction on the basis of mootness. (*See* App. A, p. 3a)[8]

In regards to the Union's appeal taken from the district court's order denying its request for a stay of Briggs' claim that the Union had breached the no strike clause pending the arbitration of such claim, the three member panel, with one member dissenting, dismissed the Union's appeal for want of jurisdiction under either 28 U.S.C.

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arbitrator had issued his decision involving the Union's grievance. Briggs' damage action has remained stayed since that time although the arbitration decision in that matter issued March 29, 1994 (App. C, p. 37a).

[8] The Union did not seek rehearing or suggest rehearing en banc as to the dismissal of its appeal on mootness grounds in 93-3868. Nor does it include that dismissal within the issues set out in its petition for certiorari. However, it is necessary to a full understanding of the issues that are presented herein to discuss the relationship between the district court's granting Briggs a preliminary injunction and its denying the Union a stay pending arbitration of Briggs' damage claim in that both are grounded in the identical arbitration provisions as contained in the CBA.

§ 1292(a)(1) or § 16 of the Arbitration Act (App. A, p. 10a).

The majority opinion held that since this Court's decision in *Gulfstream Aerospace Corp. v. Mayocoma Corp.*, 485 U.S. 271 (1988) (jurisdiction no longer could lie under 28 U.S.C. § 1292(a)(1) for an appellate court to review the denial of a stay of a § 301 damage action pending the arbitration of that claim (App. A, p. 5a).[9]

The three member panel, Judge Cummings dissenting, held that it also lacked appellate jurisdiction under § 16 of the FAA to review the district court's order denying the Union's request for a stay pending arbitration of Briggs' § 301 damage claim because the dispute was not one referable to arbitration under § 3 of the FAA.

The court of appeals majority decision did not affirm the district court's construction of the CBA but instead allowed Briggs to litigate its § 301 damage claim in a judicial forum, not an arbitrable forum, and allowing the Union the right after a final judgment was entered, if adverse, to take an appeal under 28 U.S.C. § 1291 and have it then determined by the court of appeals whether or not Briggs had been obligated to first exhaust the grievance/arbitration procedures as were provided in the CBA before initiating its § 301 action (App. A, p. 9a).

The dissenting opinion held that the court of appeals did have appellate jurisdiction to review the district court's order denying the stay requested by the Union and that the district court's order should have been reversed in that under the precedent established by the Supreme Court and followed in the past by the Seventh Circuit the Union was entitled to a stay (App. A, p. 24a).

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[9] Judge Cummings' dissenting opinion found it unnecessary to determine whether *Gulfstream Aerospace* precluded the exercise of appellate jurisdiction under § 1292(a)(1) since the majority had held that appellate jurisdiction could be had under § 16 of the FAA (App. A, p. 10a n.2).

The Union petitioned for a rehearing with suggestion for rehearing en banc. The petition was denied but Judge Ripple in a dissenting opinion from the denial of the rehearing en banc emphasized that the panel's decision had disregarded the very important doctrines of stare decisis and of precedent and without any valid reason for having done so and thereby creating a needless ambiguity in an area of the law which had been settled and in which the bench and bar had a right to expect to have a continued reasonable degree of predictability and certainty (App. E, p. 41a).

REASONS FOR GRANTING THE WRIT

The issues presented in this petition go to the heart of this nation's labor policy under § 301 as that policy has been developed and adhered to by this Court ever since its landmark decision in *Textile Workers Union v. Lincoln Mills,* 353 U.S. 448 (1957).

The centerpiece of this policy under § 301 has been that where the parties have agreed to resolve disputes arising under the labor contract through agreed to grievance arbitration procedures, that then both parties must follow those agreed to procedures. *See* § 203(d), 29 U.S.C. § 173(d) expressing the Congressional embodiment of such policy.

In the companion cases of *Atkinson v. Sinclair Refining Co.,* 370 U.S. 238 (1962)/*Drake Bakeries Inc. v. Local 50 Bakery Workers,* 370 U.S. 254 (1962), decided over thirty (30) years ago, this Court had established the standards that the lower courts were to adhere to in determining whether or not a union was entitled to a stay of an employer's § 301 damage action where the union was alleged to have breached the no strike clause contained in the labor contract.

The decision of the district court was clearly wrong and the court of appeals by failing to follow the standards as established by this Court in reviewing the denial of a stay in § 301 cases disregarded and undermined this

Court's holding in *Drake Bakeries* and the court of appeals decision is in conflict with the holdings of other court of appeals regarding the exercise of appellate jurisdiction under § 1292(a)(1) to review a district court's order denying a stay pending arbitration. In addition, the decision of the court of appeals that labor contracts do not come within the exclusion of § 1 of the FAA is in conflict with the holding of the majority of courts of appeals that hold that labor contracts are not covered by the FAA.

The court of appeals decision is not only hostile to arbitration but also is inconsistent with the principle that where the parties have agreed to arbitration that then arbitration, not litigation, is to be favored and that any doubt should be resolved in favor of arbitration, not litigation. Also, the courts of appeals have been admonished by this Court that they are to avoid not reaching the merits of an appeal on non-existent technical grounds and thereby adding unnecessarily to the increased costs and delays and the expenditure of judicial resources on matters that could be resolved more expeditiously by the proper exercise of appellate jurisdiction.

All the foregoing being so, this case plainly calls for this Court's review.

I. APPELLATE JURISDICTION TO REVIEW A DISTRICT COURT ORDER DENYING A STAY PENDING ARBITRATION IN A CASE THAT ARISES UNDER § 301 IS 28 U.S.C. § 1292(a)(1) AND NOT § 16 OF THE FAA AND SUCH APPELLATE JURISDICTION UNDER 28 U.S.C. § 1292(a)(1) IS NOT BARRED BY THIS COURT'S DECISION IN *GULFSTREAM AEROSPACE CORP. v. MAYOCOMA CORP.*, 485 U.S. 271 (1988).

The court of apeals, based on its earlier decision in *Pietro Scalzitti Co. v. Operating Engineers,* 351 F.2d 576, 578-80 (7th Cir. 1965) held that the CBA did not fall within the exclusion of § 1 of the FAA and was therefore subject to the provisions of the FAA. It recog-

nized that the majority of the court of appeals have held that labor contracts, otherwise enforceable under § 301, do fall within the exclusion of § 1 of the FAA and therefore do not come under the FAA (App. A, p. 5a).

If labor contracts enforceable under § 301 are excluded from coverage under § 1 of the FAA then § 16 of the FAA would not necessarily provide the statutory basis for appellate jurisdiction to review a district court order denying a stay pending arbitration in a § 301 *Drake Bakeries* type situation.[10]

In *United Food and Commercial Workers Local Union No. 74 v. Safeway Stores Inc.*, 889 F.2d 940, 943-44 (10th Cir. 1989) the Tenth Circuit in agreement with the Eleventh Circuit in *American Postal Workers Union v. United States Postal Service*, 823 F.2d 466, 473 (11th Cir. 1987) held that collective bargaining agreements constitute "contracts of employment" within the meaning of the exclusion of 9 U.S.C. § 1 FAA. *Also see Posadas de Puerto Rico Assoc., Inc. v. Association de Emploeados de Casino de Puerto Rico*, 873 F.2d 479, 482-85 (1st Cir. 1989) [First Circuit rejects the statutory time period for vacating an award as provided for in the FAA as controlling in a § 301 suit seeking to vacate a labor arbitration award]. *Also see Domino Sugar v. Sugar Workers Local 392*, 10 F.3d 1064, 1067-1068 (4th Cir. 1993).

In *United Paperworkers Int'l Union v. Misco Inc.*, 484 U.S. 29 (1987) this Court reaffirmed that in developing the substantive law to be applied in § 301 cases, that the federal courts could look to various sources, including the FAA. This, however, did not mean that labor contracts were covered under the FAA, *Misco supra*, 484 U.S. at 40 n.9. *Also see Gilmer v. Interstate/Johnson*

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[10] This is not to say that an appellate court could not look to § 16 of the FAA for guidance in determining whether to exercise appellate jurisdiction in a case that arose under § 301. *See Textile Workers Union v. Lincoln Mills, supra*, 353 U.S. at 456-457.

Lane Corp., 500 U.S. 20, 114 L.Ed.2d 26, 46-47 (1991) (Stevens, J., dissenting).

The court of appeals' holding that the CBA was not excluded by § 1 of the FAA is not consistent with this Court's rationale in *Misco, supra,* and it is in conflict with the majority of the courts of appeals that have held that collective bargaining agreements do fall within the exclusion of § 1 of the FAA and this conflict warrants this Court's review because the court of appeals limited the appellate jurisdiction in cases arising under § 301 and denying a stay to § 16 of the FAA.

The court of appeals held that this Court's decision in *Gulfstream Aerospace Corp. v. Mayocoma Corp.*, 485 U.S. 271 (1988) precluded courts of appeals from exercising appellate jurisdiction to entertain appeals taken from the denial of a stay under 28 U.S.C. § 1292(a)(1) and including cases that arose under § 301. (*See* App. A, pp. 4a-5a)

At the time this Court decided the cases of *Atkinson/ Drake Bakeries* in 1962 it was then accepted that the courts of appeals had appellate jurisdiction under 28 U.S.C. § 1292(a)(1) to review district court orders in § 301 cases where the district court had either granted or denied a stay pending arbitration.[11]

In *Sinclair Refining Co. v. Atkinson*, 290 F.2d 312, 314 n.2 (7th Cir. 1961) the district court had denied a union's request for a stay and the court of appeals exercised appellate jurisdiction under § 1292(a)(1) and affirmed the district court's order. This Court affirmed that the denial of the stay was correct based on the language in the labor contract. *See Atkinson v. Sinclair Refining Co.*, 370 U.S. at 245.

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[11] *See Drake Bakeries, supra,* 370 U.S. at 264 n.13 and n.14 citing the various courts of appeals decisions that had reviewed district court orders in § 301 cases that had granted or denied stays pending arbitration.

In *Drake Bakeries,* the district court had granted the union's request for a stay and the stay was affirmed on appeal. This Court affirmed and held that ". . . the judgment affirming the opinion of the District Court was correct . . ." *Drake Bakeries,* 370 U.S. at 267.

The standard that was used in both *Atkinson* and *Drake Bakeries* for determining whether or not the grant or denial of a stay in a § 301 case was proper was to be determined from the language in the parties' labor contract and whether that labor contract was susceptible to a construction that would make the employer's claim one subject to the grievance arbitration provisions and resolving all doubts in favor of arbitration.

If the labor contract was susceptible to a construction that the employer's claim was subject to the grievance/arbitration procedures then the moving party was entitled to a stay, *e.g., Drake Bakeries, supra.* If the labor contract was not so susceptible of such a construction then the moving party would not be entitled to a stay, *e.g., Atkinson, supra.*[12]

In 1988 this Court issued its decision in *Gulfstream, supra,* 485 U.S. 271 (1988). This Court in *Gulfstream* overturned the Enelow-Ettelson doctrine and announced for the guidance of the lower courts that district court orders granting or denying stays should no longer be automatically appealable under § 1292(a)(1), but that such review could continue to be available where "truly needed" and where the order granting or denying a stay had the practical effect of granting or denying an injunction. *Id.* at 485 U.S. at 287-88.

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[12] In his dissenting opinion Judge Cummings held that the language in the CBA had demonstrated that Briggs' § 301 claim was clearly subject to the arbitration procedures contained in the CBA (App. A, pp. 22a-23a). The court of appeals majority doesn't hold otherwise, but simply avoided reaching the issue because it held that it had no appellate jurisdiction to review the merits of the district court's order.

After *Gulfstream* the courts of appeals for the Fourth Circuit, Eighth Circuit, and First Circuit have held that appellate jurisdiction did continue to exist under § 1292 (a)(1) to review district court orders that had denied stays pending arbitration or an order staying arbitration. *See Kansas Gas & Elec. v. Westinghouse Elect. Corp.*, 861 F.2d 420, 422-23 (4th Cir. 1988); *Norden v. Nutri System Inc.*, 897 F.2d 339, 340-42 (8th Cir. 1990); *Tejidos de Coamo, Inc. v. ILGWU*, 22 F.3d 8, 10 (1st Cir. 1994).[13]

An order denying a stay pending arbitration in the context of a *Drake Bakeries* § 301 action is the functional equivalent of an order denying an injunction[14]. The court of appeals decision that it lacked appellate jurisdiction under § 1292(a)(1) to review the district court order denying a stay pending arbitration was not only not mandated by this Court's decision in *Gulfstream*, but was in conflict with the decisions of other courts of appeals subsequent to *Gulfstream* that had held that appellate ju-

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[13] In *Tejidos de Coamo Inc.*, the First Circuit exercised appellate jurisdiction under § 1292(a)(1) to review a district court order in a § 301 action that had stayed an arbitration proceeding. The First Circuit held that ". . . an order staying arbitration is an injunction that is immediately appealable under 28 U.S.C. § 1292(a)(1), even where section 16 of the Federal Arbitration Act does not apply to the particular order . . ." 22 F.2d at 11.

[14] The seeking of a stay by a union of an employer's § 301 damage action pending arbitration of that claim is the equivalent of an employer seeking an injunction in a § 301 *Boy's Market v. Retail Clerks Union*, 398 U.S. 235 (1970) situation. A *Drake Bakeries* stay and a *Boy's Market* injunction are both grounded in a policy embodied in § 301 that favors arbitration over the use of other means to resolve disputes arising under the labor contract. The Union had opposed Briggs' application for a preliminary injunction on the grounds that the Union had not rejected arbitration but had demanded arbitration; that the work to rule campaign had ended prior to the filing of the § 301 action; and that Briggs had not limited its relief to simply specific performance, but was seking in excess of three million dollars in damages for itself and employees and these factors distinguished this case from *Boys Markets*.

risdiction continued to exist under § 1292(a)(1) to review orders denying stays pending arbitration because of the importance that arbitration has generally and specifically in regards to labor disputes arising under § 301.[15]

II. THE STANDARD ESTABLISHED BY THE COURT OF APPEALS FOR DETERMINING WHETHER OR NOT A UNION IS ENTITLED TO A STAY OF AN EMPLOYER'S § 301 DAMAGE ACTION PENDING THE ARBITRATION OF SUCH DAMAGE CLAIM WAS INCONSISTENT WITH THE STANDARD AS ESTABLISHED BY THIS COURT IN *ATKINSON/DRAKE BAKERIES.*

In the companion cases of *Atkinson v. Sinclair Refining Co.* and *Drake Bakeries*, issued on the same date over 30 years ago this Court set the substantive standards to be followed by the lower courts, both trial and appellate, in cases arising under § 301 and where a union being sued for a breach of the labor contract's no-strike clause had requested a stay of such damage action on the grounds that the labor contract had obligated the employer to arbitrate, not litigate, such a claim.

The *Atkinson/Drake Bakeries*' standard as established by this Court has been simple, easily understood, and was predicated on the language in the parties own agreed to labor contract and such standard has worked quite well over the many years since established.

The Seventh Circuit in an earlier decision in *Mautz & Oren v. Teamsters Local No. 279*, 882 F.2d 1117, 1126-1127 (7th Cir. 1989) had not only adhered to the standard as set out in *Atkinson/Drake Bakery*, but emphasized

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[15] In determining whether § 1292(a)(1) could be used as a proper basis for appellate jurisdiction in a case arising under § 301, the court of appeals could, of course, look to § 16 of the FAA for guidance, but this is not the same as finding that labor contracts are subject to the FAA. *See Misco, supra.*

the proper procedure to be followed in a § 301 action by the party seeking a stay pending arbitration, procedures which were followed by the Union.

Under the *Atkinson/Drake Bakery* standard the language in § 3 FAA pertaining to "any issue referable to arbitration under an agreement in writing for such arbitration" simply had meant that the district court would look to the labor contract and from the language contained in it determine whether or not the employer's claim was one that was subject to the grievance arbitration provisions provided for in the labor contract. If such labor contract was susceptible to a construction that made the dispute subject to arbitration, the district court was to grant the stay. *Drake Bakeries, supra.*[16] If not, the stay was to be denied. *Atkinson, supra.* Section 4 of the FAA played no part in the determining whether a union was entitled to a stay in a § 301 action because the employer's duty to arbitrate didn't derive from § 4 of the FAA but from § 301(a). The court of appeals, however, appears to infer that the Union should have invoked § 4 of the FAA to compel Briggs to arbitrate even though this was a § 301(a) case brought by Briggs and it was Briggs that was pursuing its claim for damages against the Union (App. A, pp. 6a-7a).

The dissenting opinion of Judge Cummings, supported by authority, demonstrates that the district court's conclusion that the CBA was not susceptible to any construction that would subject Briggs' breach of contract claim

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[16] There was no claim that the union had either waived or defaulted in its right to a stay pending arbitration. *See Drake Bakeries, supra,* 370 U.S. at 267 n.17. Also see, Judge Cummings' dissenting opinion finding no waiver or default (App. A, pp. 17a-18a). Under the new standard of the court of appeals the fact that the Union had neither waived or defaulted in its right to a stay, will no longer mean the Union should be granted a stay even where the Employer's claim was otherwise subject to arbitration under the labor contract.

to arbitration was manifestly wrong as a matter of law under § 301 (App. A, pp. 22a-23a).[17]

The majority opinion, however, instead of following *Drake Bakeries* chose instead to depart from the standards as had been eseablished and applied in *Atkinson/Drake Bakery* and been adhered to ever since by all the other courts of appeals, as well as the Seventh Circuit, *see Mautz & Oren, supra,* 882 F.2d at 1126 n.15 and cases cited therein and it established a new standard for the denial of a stay in a § 301 case.

Under the new standard as promulgated by the court of appeals in cases arising under § 301, and apparently under the FAA as well it will no longer be enough in the Seventh Circuit for a union seeking a stay of an employer's damage action to show to the district court that the employer's claim was one that the employer had agreed would be subject to arbitration and that the union had unequivocally made it known to the district court at the outset that the union was prepared to arbitrate such claim if requested to do so by the employer.

The dissenting opinion pointed out that, "The majority provides no principled reason for departing from Supreme Court and Circuit precedent on the issue of what constitutes a proper request for arbitration made in the course of litigation" (App. A, p. 19a). *Also see* Judge Ripple's dissenting opinion from the denial of rehearing en banc where he emphasizes the doctrine of stare decisis and precedent that the majority opinion chose to ignore (App. E, p. 41a).

In *Drake Bakeries* this Court had expressly rejected the employer's argument that the union by not itself de-

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[17] The district court's treatment of the issues presented to it, namely the granting of Briggs request for an injunction while denying the Union's request for a stay more nearly track pre-Norris La Guardia treatment of labor disputes by the courts than post *Textile Workers Union v. Lincoln Mills, supra,* analysis. *Also see* Frankfurter & Greene, *The Labor Injunction* (1930).

manding arbitration had thereby defaulted and was not therefore entitled to a stay. *Drake Bakeries, supra,* 370 U.S. at 266-267 and n.17. The court of appeals has chosen to disregard this holding.

The new standard also conflicts with the Congressional policy that "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement . . ." *see* § 203(d).

The Union's seeking to have Briggs properly pursue its claim through the grievance procedures as provided for in the CBA is not inconsistent with the Union's right to have Briggs arbitrate, not litigate, its § 301 claims that the Union had breached the no-strike clause. *Cf. Domino Sugar v. Sugar Workers Local 392,* 10 F.2d 1064 (4th Cir. 1993). *Also see Republic Steel Corp. v. Maddox,* 379 U.S. 650 (1965); *Wiley v. Livingston,* 376 U.S. 543 (1964) (procedural questions in § 301 cases left for arbitrator to decide).[18]

Under the new standard the Union will be required to be subjected to litigating, not arbitrating, because the employer has chosen to disregard the contractually agreed to means for resolving disputes and even though the Union was willing to arbitrate such a claim if the employer requested it to do so. The court of appeals assertion that the Union would prefer litigation, not arbitration, is simply not supported by the record (App. A. p. 7a). It ignores that the reason the Union appealed the denial of the stay was because if Briggs was to be permitted to pursue its claim then it should at the very least be in an arbi-

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[18] Exhaustion of the grievance/arbitration procedures is a prerequisite for an employee bringing a § 301 suit, *see Vaca v. Sipes,* 386 U.S. 171 (1967). Here Briggs is seeking to recover damages for employees and itself, but neither Briggs or any employees ever initiated any grievance or sought arbitration as a prerequisite to the § 301 suit.

tral forum and not a judicial forum. The application of the new standard also conflicts with the principle consistently adhered to by this Court that where the parties have agreed to arbitration that it is for the arbitrator not the courts to determine whether there was a breach of the no strike clause as well as the remedy for any such breach and that ". . . [the parties] have not contracted for a judicial preview of the facts and the law . . ." *Buffalo Forge Co. v. Steelworkers*, 428 U.S. 397, 410-12 (1976).

Under the new standard as adopted by the court of appeals it will mean that whether the dispute was one that should've been subject to arbitration, will be left to be resolved *after* the dispute has first been fully litigated in a judicial forum not an arbitral forum, and only after a final judgment had been entered under 28 U.S.C. § 1291. At that time the union would be able to appeal and according to the court of appeals, "If the union is right, and an arbitral award on the 'concerted slow down' question is a precondition to damages, then the employer will lose this suit outright. There will be one trial, one appeal, and no arbitration . . ." (App. A, p. 9a).

Such a standard favoring litigation over the use of arbitration is contrary to the policies as this Court has pronounced that underlie both § 301(a) and the FAA *Textile Workers Union, supra* and *Allied-Bruce Terminex Cos. v. Dobson*, 513 U.S. ——, 130 L.Ed.2d 753, 762 (1995).[19]

Moreover, a district court's order denying a stay under the court of appeals new standard would still have to

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[19] ". . . These provisions [§§ 3 and 4 of the FAA] require that *federal* courts specifically enforce arbitration agreements. These provisions deal, respectively, with the potential plaintiffs and the potential defendants in the underlying dispute: § 3 holds the plaintiff to their promise not to take their claims straight to court, while § 4 holds the defendants to their promise to submit to arbitration rather than making the other party sue them . . ." 130 L.Ed.2d at 776 (Thomas, J. dissenting). The court of appeals application of § 3 FAA is inconsistent with this principle.

be appealed in order to avoid having it later held that by not appealing the Union had waived its right under *Drake Bakery* to have had the dispute arbitrated. *See E. T. Simmonds Const. Co. v. Local 1330 of Int'l Hod Carriers,* 315 F.2d 291, 295 (7th Cir. 1963).[20]

The court of appeals in attempting to rationalize its decision asserted that "Section 16 of the Arbitration Act does not authorize an interlocutory appeal when there is no arbitration in prospect . . ." (App. A, p. 9a). However, the only reason there was no arbitration in prospect was because the court of appeals had chosen to ignore or condoned Briggs rejection of arbitration and had disregarded the precedent established in *Drake Bakeries.* It also in rationalizing the result it reached disregarded the prior Seventh Circuit precedent as well as other courts of appeals' decisions that have consistently held that the use of the word "may" in the grievance/arbitration provision of a labor contract does not mean that arbitration is optional or elective. *See Ceres Marine Term. v. Int'l Longshoremen's Assn.,* 683 F.2d 242, 246 (7th Cir. 1982). *Also see Local 771, I.A.T.S.E. v. RKO General Inc.,* 546 F.2d 1107, 1116 (2d Cir. 1977); *United Steel Workers of America v. Ft. Pitt Steel Casting,* 598 F.2d 1273, 1279 (3d Cir. 1979); *Bonnot v. Congress of Independent Union Local #14,* 331 F.2d 355, 359 (8th Cir. 1964, Blackmun, J.). *Also see* Judge Cummings' dissenting opinion (App. A, p. 12a n.3).

The court of appeals' decision which results in litigation, not arbitration, also ignored that a district court would continue to retain jurisdiction after issuing a stay to police the stay. This would mean should the employer

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[20] If a district court were to deny a stay for the reasons as given by the court of appeals the question then would be whether or not appellate jurisdiction existed to even review such an order since the court of appeals held that it lacked appellate jurisdiction under § 16 of the FAA to review disputes not referable to arbitration under § 3 of the FAA.

whose § 301 damage action was stayed not proceed to prosecute its claim through arbitration as provided for in the labor contract, the union could then request the district court to dismiss the employer's damage action pursuant to Rule 41(b) Fed. R. Civ. P. *See Morris v. Morgan Stanley & Co.*, 942 F.2d 648 (9th Cir. 1991). *Also see Miller v. Aacon Auto Transport Inc.*, 545 F.2d 1019 (5th Cir. 1977) providing for the lifting of the stay in the event the Union were not to participate in good faith in the arbitration proceedings.

In this manner the policy of favoring arbitration could be furthered and without forcing a union to have to first undergo the costs and delay of totally unnecessary litigation and only to take an appeal from the result and it would also result in not expending judicial resources in trials where the dispute was one that under the parties' contract was subject to a hearing before an arbitrator selected by the parties.

By declining to assert appellate jurisdiction to determine the simple question of whether the district court had incorrectly applied *Atkinson* when it should have applied *Drake Bakeries* based upon the wholly undisputed language in the CBA, the court of appeals not only undermined *Drake Bakeries* but in addition failed to adhere to this Court's pronouncement in *Foman v. Davis*, 371 U.S. 178, 181-82 (1962) and it has wholly disregarded the importance that labor arbitration plays in our national labor policy.

CONCLUSION

For the above-stated reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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